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April 19, 2022

The Honorable Pete Buttigieg
Secretary of Transportation
via regulations.gov

William H. Jones II
U.S. Department of Justice Antitrust Division
bill.jones2@usdoj.gov

Re: Market-clearing of excess supplier demand for airspace frequencies from the U.S. to Cuba, Dockets DOT-OST-: 2001-9849, 2016-0021, 2020-0011, 2020-0129

Exhaustless Announces Auction of Frequencies to Havana

The Department of Transportation has imposed economic sanctions on Cuba by limiting the annual number of round-trip flights to the Havana airport (HAV) to 3,600, and has administratively allocated 2,426 round-trip frequency reservations.¹ However, charter air carriers have requested more than 3,600 round-trip frequency reservations.²

Exhaustless hereby announces an auction of round-trip frequency reservations for the Winter 2022 season to José Martí International Airport (HAV) in Havana, Cuba, to all air carriers and foreign air carriers that hold the necessary authority to provide such service.

The U.S.-Cuba air transport agreement permits all carriers “holding all necessary authorizations and licenses” to provide service between the U.S. and Cuba.³ Congress requires price, route, and service in air transportation to be determined through competitive markets. The daily

¹ See Order 2022-3-19, Docket DOT-OST-2020-0011 (Mar. 25, 2022).

² See Docket DOT-OST-2020-0011 for applications filed between Mar. 17, 2022, and Apr. 12, 2022, from iAero, World Atlantic, GlobalX, and Aruba Airlines.

³ See Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of Cuba, §1.1 and Annex (Feb. 16, 2016) (“The United States and Cuba intend to provide the following permissions for the conduct of international air transportation by airlines of either Country holding all necessary authorizations and licenses: The permission to perform scheduled and charter services between any point or points in the United States and any point or points in Cuba.”)



frequencies to Havana are one terminal point of the route. Exhaustless provides a judicially-reviewed competitive market for airspace reservations.⁴

1. First Amendment Protected Commercial Speech

All eligible carriers may participate in the auction to discover the market price of shared exclusive access to the frequency reservations to Cuba, as protected by the carriers' First Amendment rights of free speech.

[I]n the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. . . . As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.⁵

The administrative allocation of these reservations to grandfathered carriers, for free, interferes with Exhaustless' competitive market allocation.

Price is the central nervous system of the economy, and an agreement that interferes with the setting of price by free market forces is illegal on its face. * * * The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.⁶

⁴ See Exhaustless' comment opposing an administrative allocation, Docket DOT-OST-2020-0051 (Feb. 22, 2022) ("49 U.S.C. § 40109 DOES NOT allow for exemption from 49 U.S.C. § 40101, nor from the antitrust laws, nor from a bilateral treaty.")

⁵ *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976).

⁶ *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 692, 695 (1978) (internal quotation marks and citations omitted).



2. Market Competition Required

The Airline Deregulation Act of 1978 requires market competition to determine price, route, and service; see 49 U.S.C. § 40101(a)(12). The AIR-21 Act prohibits carriers from using the administrative allocation by grandfathering; see 49 U.S.C. § 41715.⁷ A federal court ruled that the current administrative allocation “resembled the High Density Rule and generally grandfathered the slots held by airlines under the previous regime.”⁸

Carriers must compete over the DOT order; no administrative order exempts carriers from the competition required by the antitrust laws.⁹

The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.¹⁰

3. Frequency Reservations to be Auctioned

On **June 1, 2022**, Exhaustless will auction between 9 to 10 daily round-trip frequency reservations for the 147-day Winter 2022 season, which begins on October 30, 2022, and ends on March 25, 2023 — for a total of 1,454 reservations.¹¹

4. License Agreement

To be eligible to participate in the auction, carriers authorized to provide service to Cuba must license the Exhaustless Aviation 2.0 Operating Standard by **May 2, 2022**.

<https://www.exhaustless.com/>

<https://www.airportslotauction.com/>

⁷ See Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), Pub. L. No. 106-181, §231, 114 Stat. 61, 108 (2000).

⁸ See *Exhaustless inc. v. FAA*, 931 F. 3d. 1209, 1211 (D.C. Cir. 2019).

⁹ See 15 U.S.C. § 21(e) (“No order of the . . . Secretary . . . shall in anywise relieve or absolve any person from any liability under the antitrust laws.”).

¹⁰ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

¹¹ The Summer 2022 season is 31 weeks (60% of the year), the Winter 2022 season is 21 weeks (40% x 3,600 DOT’s annual limit = 1,454).



CERTIFICATE OF SERVICE

A copy of the foregoing was served on April 19, 2022, on the following:

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/s/ Steven P. Endres

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